STATE OF MICHIGAN

COURT OF APPEALS

KATRINA WASHINGTON, Personal Representative of the Estate of DAVE WASHINGTON, JR., Deceased,

Plaintiff-Appellant/Cross-Appellee,

v

WILLIAM A. JACKSON, M.D.,

Defendant-Appellee/Cross-Appellant,

and

COMMUNITY HEALTH CARE PROVIDERS, INC., f/k/a UNITED COMMUNITY URGENT CARE CENTER, INC.,

Defendant-Appellee,

and

LENARD E. FOUCHE and HUGH ROLLOCKS,

Defendants.

UNPUBLISHED
December 13, 2005

No. 263108
Wayne Circuit Court
LC No. 03-337539-NH

Before: Cavanagh, P.J., and Cooper and Donofrio, JJ.

PER CURIAM.

In this wrongful death medical malpractice action, plaintiff Katrina Washington, the successor personal representative of the estate of Dave Washington, Jr., her deceased father, appeals as of right from a circuit court order granting defendant Dr. William A. Jackson's motion for summary disposition pursuant to MCR 2.116(C)(7) (period of limitation).[1] Because Tolena

[1] The circuit court also granted summary disposition to defendant Community Health Care (continued…)

Washington did not timely file this action, and the wrongful death saving provision was not tolled, the trial court properly granted summary disposition in favor of Dr. Jackson, and we affirm.

I

A

Plaintiff first contends that the circuit court erred by granting Dr. Jackson's motion for summary disposition on the basis that the period of limitation had expired because (1) the original personal representative, Tolena Washington, filed a prior medical malpractice complaint against Dr. Jackson that the parties ultimately agreed to dismiss, which tolled the running of the wrongful death saving period, and (2) Tolena Washington subsequently refiled the instant suit within the remaining portion of the wrongful death saving period.

Whether a period of limitation applies in particular circumstances constitutes a legal question that this Court considers de novo. *Detroit v 19675 Hasse*, 258 Mich App 438, 444-445; 671 NW2d 150 (2003).

> We [also] review de novo decisions regarding summary disposition motions. Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. In determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court "consider(s) all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." [*Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004), quoting *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).]

The period of limitation applicable to a wrongful death action generally constitutes the period applicable to the underlying theory of liability. *Waltz, supra* at 648. The Legislature has provided that a plaintiff must file a medical malpractice action within two years of its accrual date. MCL 600.5805(1) and (5).[2]

But the medical malpractice period of limitation does not necessarily expire on the second anniversary of the action's accrual date. For example, when a plaintiff, within the period of limitation of actions, properly commences the medical malpractice action, or, gives proper notice of her intent to pursue a claim in accordance with the mandatory provisions of MCL 600.2912b, the giving of notice or filing of the complaint may toll the running of the medical

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Providers, Inc., which is not a party to this appeal. The parties agreed to dismiss without prejudice defendants Lenard E. Fouche and Hugh Rollocks, who likewise are not parties to this appeal.

[2] According to 2002 PA 715, former MCL 600.5805(5) was renumbered as subsection (6) effective March 31, 2003. Because subsection (5) prescribed the period of limitation applicable at the time the instant cause of action accrued, MCL 600.5838a(1), this opinion refers to subsection (5).

malpractice period of limitation pursuant to MCL 600.5856, which at the time applicable to this action contained the following relevant language:

> The statutes of limitation or repose are tolled:
>
> (a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant.
>
> * * *
>
> (d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.[3]

"Thus, under this provision, filing a notice of intent to sue will toll any period of limitations or repose, if such period of limitations or repose would otherwise bar the claim, for the time period set out in the written notice of intent provision (MCL 600.2912b(1)), that is, for a period not longer than 182 days." *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 572; 703 NW2d 115 (2005).[4]

Extension of the two-year medical malpractice period of limitation also may occur in the context of a wrongful death action, like this case, pursuant to MCL 600.5852, termed, "the wrongful death saving provision," which provides as follows:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

Under the "wrongful death saving provision," "a personal representative may file a medical malpractice suit on behalf of a deceased person for two years after letters of authority are issued, as long as that suit is commenced within three years after the two-year malpractice limitations period expired." *Farley*, *supra* at 572-573. Thus, in addition to the two-year period of limitation

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[3] As of April 22, 2004, subsection 5856(d) became subsection 5856(c), and subsections (a) and (c) were reworded in a manner that is not relevant to the issues raised in this appeal. 2004 PA 87.

[4] In MCL 600.5838a(2), the Legislature provided that in addition to "the applicable period prescribed in section 5805 or sections 5851 to 5856," a malpractice plaintiff may also file suit "within 6 months after the plaintiff discovers or should have discovered the existence of the claim." The parties do not rely on the discovery rule in this case.

in MCL 600.5805(5), a personal representative may have at most an additional three years to file a wrongful death medical malpractice claim. *Waltz*, *supra* at 648-649.

The parties do not dispute the timing of the following relevant events in this case: (1) decedent Washington died on January 20, 1999, after alleged acts of malpractice by Dr. Jackson that occurred between May 1997 and July, 15, 1998; (2) Tolena Washington received letters of authority appointing her as personal representative of the decedent's estate on August 15, 2001; (3) Tolena Washington gave Dr. Jackson notice of her intent to pursue medical malpractice claims against him on November 14 or 20, 2001; (4) Tolena Washington filed a prior action against Dr. Jackson on October 3, 2002, and the parties agreed to dismiss the action without prejudice on October 10, 2003, and (5) Tolena Washington filed this action on November 12, 2003.[5] Tolena Washington thus undisputedly commenced this suit more than two years beyond the two-year medical malpractice period of limitation, MCL 600.5805(5), which expired at the latest on January 20, 2001, the second anniversary of the last possible date of malpractice potentially committed by defendants. MCL 600.5838a(1). No tolling of the medical malpractice period of limitation occurred pursuant to MCL 600.5856(d) because Tolena Washington gave Dr. Jackson notice of her intent to sue in November 2001, *outside* the two-year period of limitation. See *Waltz*, *supra* at 651 (explaining that "to toll the period under § 5856(d), [the] plaintiff was required to provide notices of intent in compliance with the provisions of MCL 600.2912b before the expiration of the two-year limitation period"). Similarly, the commencement of the prior action on October 3, 2002, also occurred beyond the two-year medical malpractice period of limitation and, therefore, did not toll the period of limitation under § 5856(a).

With respect to the potential applicability of MCL 600.5852, the probate court issued Tolena Washington letters of authority appointing her personal representative of the decedent's estate on August 15, 2001. Tolena Washington thus had two years from that date, until August 15, 2003, to commence a wrongful death medical malpractice action. Tolena Washington untimely filed this suit on November 12, 2003, nearly four months after the expiration of the extended medical malpractice period of limitation provided for by the wrongful death saving provision.[6] Consequently, Tolena Washington commenced this action outside both the two-year

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[5] Katrina Washington is the successor personal representative of Tolena Washington.

[6] The three-year period mentioned in the second sentence of MCL 600.5852 does not establish a wrongful death saving period separate from the period of two years after issuance of letters of authority:

> We note that the three-year ceiling in this provision does not establish an independent period during which a personal representative may bring suit. Specifically, it does not authorize a personal representative to file suit at any time within three years after the period of limitations has run. Rather, the three-year ceiling limits the two-year saving period to those cases brought within three years of when the malpractice limitations period expired. As a result, while the three-year ceiling can *shorten* the two-year window during which a personal

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medical malpractice period of limitation and the two-year wrongful death saving provision in § 5852.

Plaintiff suggests that the November 12, 2003, complaint nonetheless qualifies as timely in light of the fact that Tolena Washington previously had filed a medical malpractice action against Dr. Jackson on October 3, 2002. According to plaintiff, this action, filed before the expiration of the two-year wrongful death saving period applicable to Tolena Washington on August 15, 2003, tolled the running of the wrongful death saving period for just over one year, between the October 3, 2002, filing date and the October 10, 2003, dismissal of the action pursuant to the parties' stipulation. And when the tolling period ended, Tolena Washington timely filed the November 12, 2003 complaint within the remaining portion of the wrongful death saving period.

In April 2004, our Supreme Court definitively resolved the question whether any of the tolling provisions in MCL 600.5856 may toll the wrongful death saving provision in MCL 600.5852. *Waltz*, *supra* at 642. In *Waltz*, the plaintiff's four-year-old son, who had experienced "vomiting, diarrhea, pneumonia, and problems leading to dehydration and an inability to eat," received treatment from the defendant doctor shortly before he died at the defendant hospital on April 18, 1994. *Id*. at 644-645. In January 1999, pursuant to MCL 600.2912b, the plaintiff notified the defendants of her intent to file against them a wrongful death medical malpractice action. *Id.* at 644-645. The plaintiff was appointed personal representative of the decedent's estate on May 27, 1999, and filed a wrongful death medical malpractice action on June 23, 1999. *Id*. at 645.

The defendants joined in a motion for summary disposition of the plaintiff's complaint, "arguing that [the] plaintiff had failed to file . . . within either the applicable two-year limitation period for malpractice actions, MCL 600.5805(5), or the additional period allowed for wrongful death actions under § 5852." *Waltz*, *supra* at 645. The circuit court granted the defendants' motion, agreeing with their contention that "the notice tolling provision, § 5856(d), did not toll the wrongful death 'extension period,' § 5852." *Waltz*, *supra* at 646-647. This Court affirmed the circuit court's summary disposition ruling on the basis that the period of limitation barred the plaintiff's claim. *Waltz v Wyse*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 2002 (Docket No. 231324).

The Supreme Court quoted and adopted the analysis of this Court finding that the "plaintiff failed to file her complaint within five years after her son's death," and rejecting the plaintiff's assertion that "the notices of intent given to [the] defendants tolled the extended five-year limit set forth in the savings statute, MCL 600.5852." *Waltz*, *supra* at 649-650. The Supreme Court explained in relevant part as follows that the tolling provisions in MCL 600.5856 do not toll the potentially extended period within the wrongful death saving provision:

(…continued)

representative may file suit, it cannot *lengthen* it. [*Farley*, *supra* at 573 n 16 (emphasis in original).]

> Section 5856(d), by its express terms, tolls only the applicable "statute of limitations or repose." As we recently stated in *Miller*[*v Mercy Memorial Hosp Corp*, 466 Mich 196, 202; 644 NW2d 730 (2002)], the wrongful death provision, § 5852, "is a *saving statute*, not a statute of limitations." See also *Lindsey v Harper Hosp*, [455 Mich 56, 60-61, 65; 564 NW2d 861 (1997),] in which we explained that § 5852, as "the statute of limitations *saving provision*" and an "*exception* to the statute of limitations," operated "to suspend the running of the statute until a personal representative is appointed to represent the interests of the estate."
>
> The plain language of § 5852 wholly supports our conclusion that it is not itself a "statute of limitations." . . .
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> * * *
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> By its own terms, § 5852 is operational only within the context of the *separate* "period of limitations" that would otherwise bar an action. Section 5852 clearly provides that it is an *exception* to the limitation period, allowing the commencement of a wrongful death action as many as three years after the applicable statute of limitations has expired. [*Waltz*, *supra* at 650-651 (emphasis in original).]

Because the plaintiff had not "provide[d] her notices of intent until January 1999, well after the expiration of the two-year limitation period," and "the three-year ceiling provided in the wrongful death saving provision was not 'tolled' following [the] plaintiff's provision of the notices of intent" pursuant to MCL 600.5856, the Supreme Court concluded that her June 1999 complaint was time-barred. *Id*. at 651-652.

Plaintiff correctly observes that the Supreme Court in *Waltz*, *supra* at 642, did not specifically address whether, under MCL 600.5856(a), the filing of a prior complaint could toll the wrongful death saving period. But plaintiff apparently ignores the plain language of § 5856, which states that the filing of a complaint under § 5856(a) only operates to toll a "statute[] of limitation or repose." Therefore, precisely like the giving of the required medical malpractice notice contemplated by § 5856(d), the filing of a complaint under § 5856(a) only tolls a *period of limitation or repose*. The Supreme Court plainly held in *Waltz*, *supra* at 650-651, that because the wrongful death saving provision, MCL 600.5852, does not constitute a period of limitation, but a saving period, the tolling provisions in MCL 600.5856 do not apply to MCL 600.5852.

Because under the *Waltz* analysis none of the tolling provisions in MCL 600.5856 affect the wrongful death *saving provision*, we conclude that Tolena Washington's October 3, 2002, filing of the prior action against Dr. Jackson did not toll the wrongful death saving period. Consequently, Tolena Washington untimely initiated this action on November 12, 2003, almost

three months after the wrongful death saving period expired on August 15, 2003. Therefore, the Supreme Court's decision in *Waltz* resolves the instant dispute.[7]

B

But plaintiff additionally suggests that the Supreme Court's holding in *Waltz*, decided on April 14, 2004, has no applicability to the instant case, in which all relevant procedural events occurred before the Supreme Court decided *Waltz*. Both the Michigan Supreme Court and this Court, however, have expressly and repeatedly held that *Waltz* applies with full retroactivity.

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[7] Plaintiff incorrectly suggests that the Supreme Court in *Waltz*, *supra* at 642, and the circuit court in this case failed to recognize that MCL 600.5838a expressly incorporates MCL 600.5852 into the medical malpractice period of limitation. The plain language of § 5838a(2) merely refers to § 5852 as one of the "periods" to be potentially taken into account when determining the timeliness of a medical malpractice complaint; § 5838(2) does not define § 5852 as a period of limitation, as opposed to a wrongful death saving period.

Plaintiff also incorrectly suggests that the *Waltz* decision, which involved the filing of a complaint beyond the five-year upper limit contemplated in MCL 600.5852, does not apply when, as here, the plaintiff files a complaint or provides notice pursuant to MCL 600.5856 within the two-year wrongful death saving period. This Court in *Farley*, *supra* at 574-575, rejected this contention as follows:

> Farley argues that neither *Waltz* nor *Ousley* addressed whether a suit is timely when, as here, the personal representative filed suit within three years after the two-year medical malpractice limitations period (MCL 600.5805) had expired, and that therefore those cases do not determine the outcome here. It is true that, in *Waltz* and *Ousley*, the personal representative filed suit after both the two-year malpractice limitations period (MCL 600.5805) and the three-year ceiling set forth in the wrongful death saving provision (MCL 600.5852) had passed. *However, this factual distinction makes no difference. As noted, the three-year ceiling in the wrongful death saving provision is not an independent period in which to file suit; it is only a limitation on the two-year saving provision itself. Therefore, the fact that the three year ceiling was not reached when Farley filed suit is irrelevant.*
>
> Further, Farley's contention that *Ousley* and *Waltz* only addressed whether the notice tolling provision tolled the five-year maximum in the wrongful death saving provision, thereby leaving open the question whether the notice tolling provision might toll the two-year period in that same provision, is inaccurate. *Waltz* squarely held that the notice tolling provision (MCL 600.5856(d)) "explicitly applies only to the 'statute of limitations or repose,'" and therefore "does not operate to toll the additional period permitted under MCL 600.5852 for filing wrongful death actions." *This holding clearly applies to the two-year period in the wrongful death saving provision, MCL 600.5852.* [Emphasis added.]

See *Forsyth v Hopper*, 472 Mich 929; 697 NW2d 526 (2005); *Wyatt v Oakwood Hosp & Med Center*, 472 Mich 929; 697 NW2d 528 (2005); *Evans v Hallal*, 472 Mich 929; 697 NW2d 526 (2005); see also *McMiddleton v Bolling*, 267 Mich App 667, ___; ___ NW2d ___ (2005); *Lentini v Urbancic (On Remand)*, 267 Mich App 579, 582 n 3; ___ NW2d ___ (2005); *Ousley v McLaren*, 264 Mich App 486, 493-495; 691 NW2d 817 (2004).

C

Plaintiff also argues that this Court should invoke the doctrine of equitable or judicial tolling because applying *Waltz* retroactively will unfairly deprive the estate of its claim. Equitable or judicial tolling does not apply when a clear and unambiguous statute sets forth the applicable period of limitation, and the statute does not "hint . . . that the Legislature intended that there be any tolling of that time." *Secura Ins Co v Auto-Owners Ins Co*, 461 Mich 382, 387; 605 NW2d 308 (2000). We find no indication that applying the statutory periods of limitation in this case will occasion some fundamental unfairness or the unjust technical forfeiture of a cause of action, or that any circumstances of the instant case warrant the extraordinary application of the equitable or judicial tolling doctrine. First, neither MCL 600.5805(1) and (5), nor MCL 600.5852, or MCL 600.5856(a) contain any language suggesting that the Legislature contemplated potential equitable or judicial tolling of the medical malpractice period of limitation when a plaintiff has filed an untimely claim because of the plaintiff's miscalculation of the applicable limitation period. While plaintiff suggests that she reasonably relied on dicta set forth in *Omelenchuk v. City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled on other grounds by *Waltz, supra* at 655, the Supreme Court explained in *Waltz, supra* at 649-651, that the clear and unambiguous language employed in MCL 600.5856 and MCL 600.5852 plainly advise that a medical malpractice plaintiff's filing of notice of intent to sue, or the filing of a prior complaint, does not toll the wrongful death *saving provision*. In *Waltz*, the Supreme Court quoted its prior decision several years earlier in *Lindsey*, *supra* at 60-61, 65, which repeatedly characterized § 5852 as "the statute of limitations *saving provision*" and an "*exception* to the statute of limitations." *Waltz*, *supra* at 650 (emphasis in original). Because the clear language within §§ 5805(5), 5852, and 5856(a) does not suggest that the Legislature contemplated equitable or judicial tolling of plaintiff's untimely complaint, we reject plaintiff's attempt to invoke the doctrine. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590-591 n 65; 702 NW2d 539 (2005); *Secura Ins Co*, *supra* at 387.

II

Plaintiff next asserts that the retroactive application of *Waltz* violates equal protection guarantees. We decline to analyze this issue in detail, however, because plaintiff offers no authority supporting her claim. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998) (explaining that the appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for her claims, or unravel and elaborate her arguments, and then search for authority to sustain or reject her position).

We briefly note that plaintiff's equal protection argument appears meritless. For example, plaintiff fails to identify any similarly situated class treated differently for period of limitation purposes; plaintiff seeks to compare living plaintiffs who timely file medical malpractice complaints under MCL 600.5805 with personal representatives who file wrongful death medical malpractice complaints after the expiration of the medical malpractice period of limitation. *Morales v Parole Bd*, 260 Mich App 29, 49; 676 NW2d 221 (2003). Furthermore, differently classifying medical malpractice plaintiffs does not qualify as suspect, *Zdrojewski v Murphy*, 254 Mich App 50, 79; 657 NW2d 721 (2002), and, relevant to the rational basis test applicable to social and economic legislation, the plain statutory language of the wrongful death saving period and its interplay with the medical malpractice period of limitation has been viewed as providing a constitutionally reasonable period during which personal representatives can pursue claims on behalf of an estate. *Waltz, supra* at 652 n 14; *Farley, supra* at 576 n 27; *Ousley, supra* at 495-496.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio

I concur in result only.

/s/ Jessica R. Cooper